RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *ET AL.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

THE UNITED ARAB EMIRATES *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The United Arab Emirates is sovereign nation and a primary ally of the United States in the Middle East. It maintains an embassy in Washington, D.C., headed by its ambassador, referred to in diplomatese as the "Ambassador Extraordinary & Plenipotentiary."[2] That embassy houses delegations from several UAE agencies, including (in addition to the Ministry of Foreign Affairs) the Ministry of Defense, the Ministry of Higher Education, the Abu Dhabi Police Department, and others. The UAE also maintains consulates in several U.S. locations (New York, Boston, Los Angeles, and Houston).

The UAE believes the ruling of the Second Circuit panel below creates significant uncertainty on the fundamental question of how service can be accomplished in accord with both the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611, and the protections of the Vienna Convention on Diplomatic Relations against host-country intrusion on embassies and ambassadors. It also threatens to undermine established procedures used by embassies like the UAE's, and by diplomatic consulates and missions (including the U.N. missions

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[1] Pursuant to Rule 37.6, the Embassy of the UAE certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than this amicus, has made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondents have consented to the filing of this *amicus* brief.

[2] *See* U.S. Department of State Pub. 11211, Diplomatic List (Summer 2016) at 98, www.state.gov/documents/organization/260990.pdf.

of many, if not most, countries), for dealing both with formal service of process and with the persistent flow of other incoming materials.

The UAE has no interest in the underlying substantive claims asserted in the Harrison complaint against Sudan, though (like all members of the Global Counterterrorism Forum, a U.N. coalition of 29 countries, in which the UAE co-chairs the Working Group on Countering Violent Extremism[3]), the UAE continues to support the United States in responding to events like the attack underlying the Harrison complaint.

SUMMARY OF ARGUMENT

The Second Circuit panel's interpretation of the manner by which mail service may be carried out on a foreign government under the FSIA not only conflicts with the established law of at least three other circuits, including the circuit charged by Congress with principal responsibility to oversee actions against foreign nations. It not only contradicts the express obligations of the United States under the Vienna Convention on Diplomatic Relations. It not only fails to conform to the explicit language of the statute requiring that mail service must be "dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned," not to an intermediary connected to the state's foreign ministry. 28 U.S.C. § 1608(a)(3). And it not only ignores the precise changes Congress made during the FSIA legislative history to avoid the very result the panel endorses.

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[3] *See* https://www.thegctf.org/About-us/Structure.

The panel's ruling also threatens to disrupt the routine, regular functions of embassies in Washington, and – if applied to other diplomatic missions, as its logic suggests – the functioning of consulates and other diplomatic offices, including the offices of permanent U.N. representatives that nearly every country maintains within the jurisdiction of the Second Circuit.

Embassies receive mail packages every day – from their own nationals, from other embassies, from the State and Defense Departments and other federal agencies, from U.S. citizens seeking a visa or a meeting, from media outlets, from non-governmental advocacy organizations, from academic researchers. Virtually all embassies in Washington have reinforced perimeters and secured mailrooms in which specialized personnel – trained in security procedures, not diplomacy, and most often not even nationals of the country represented – examine and log incoming packages.

The panel's notion that someone in this secured zone can sign a "return receipt" form and thereby jettison the specific protections of the FSIA and the Vienna Convention is cavalier. So too is its notion that the embassy can adopt a policy of rejecting all incoming mail packages, in order to assure that its security or mail staff does not inadvertently embroil the country in U.S. litigation. And the suggestion that a plaintiff can commandeer the embassy's ambassador or diplomatic pouch to convey a complaint to the defending state's foreign ministry is in fundamental violation of the protections of the Vienna Convention.

U.S. embassies in foreign capitals like Abu Dhabi have even more heavied-up systems for dealing with incoming mail materials, none of which are tuned to screen out local court system complaints that may be in the pile. The U.S. position, consistent with the case law prior to the Second Circuit panel's ruling and with decades of established practice – and articulated forcefully in the United States' amicus briefs below – is that such attempts to accomplish service via an embassy are invalid.

This Court should grant certiorari to reestablish consistency and clarity in the U.S. courts on this important aspect of respect for foreign sovereignty.

ARGUMENT

I. The Statutory Language Plainly Instructs that Service Must Be Made Directly to the Foreign Minister, Not Via the State's Ambassador.

Section 4(a) of the FSIA provides that, where no international convention or special arrangement on service in place, a foreign state may be served "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed *and dispatched* by the clerk of the court *to the head* of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3) (emphasis added).

The Second Circuit panel opinion curiously italicizes the first half of the action required by the statute – that the service must the "addressed" to the head of the foreign ministry – but not the second half, which mandates that the service be "dispatched ... to"

the foreign minister. Pet. App. 104a. Yet it is the second act – the specified "dispatch" of the complaint – that triggers effective service under the statute.

Under any canon of statutory construction, the plain meaning of "dispatched to" requires that the document be sent directly to the foreign minister at the foreign ministry of the country to be served. The common understanding of the term "dispatch" is "to send someone or something to a place for a particular purpose."[4] One does not "dispatch" a taxi "to" an address by sending it to a different location. Similarly, "dispatch" of a complaint "to the head of the ministry of foreign affairs" is not accomplished by sending it to a stand-in selected for the convenience of the dispatcher. That "[t]he papers were specifically addressed to the Minister of Foreign Affairs via the embassy, and the embassy sent back a return receipt acknowledging receipt of the papers" (Pet. App. 109a) is insufficient, because the papers were not "dispatched to" the foreign minister.

As the petition shows, the FSIA drafters specifically dropped language that would have permitted service by "mail ... to the ambassador or chief of mission of the foreign state," in response to State Department objections. Pet. at 23-24. State proposed and Congress enacted the "dispatch to" formulation to avoid both the legitimate objections raised by other countries that service on an

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[4] Cambridge English Dictionary, http://dictionary.cambridge.org/us/dictionary/english/dispatch; accord, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/dispatch ("send off to a destination or for a purpose").

ambassador would violate the Vienna Convention, and the likelihood that U.S. courts would invalidate service attempts on that basis, generating additional diplomatic tensions over litigation like the case against Sudan here. 71 Dept. of State Bull. 458-59 (1974).

"Congress' intent is found in the words it has chosen to use," *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring), and the words Congress chose for section 4(a)(3) create a precisely-framed avenue for subjecting a foreign state to the obligation to respond to a court complaint despite its sovereign immunity. The Second Circuit panel here departed from that framework, and from the interpretations of three sister circuits that follow the recognized law on this topic.

II. The Second Circuit Panel's Ruling Will Disrupt the Functioning of Embassies and Diplomatic Missions.

The crux of the panel's ruling on rehearing is that the Sudanese embassy "could have rejected the mailing" but elected not to do so. Pet. App. 101a. In at least two ways, this analysis displays a lack of comprehension of how embassies and diplomatic missions operate – which is perhaps attributable to the lack of a developed record supporting the panel's conclusions[5] – and threatens to disrupt embassies'

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[5] *See* Pet. at 9-10, 13 (package addressed to individual who had ceased to be Sudan's foreign minister six months prior to mailing of service package; return receipt signature illegible; tracking record shows package final destination as two hours' drive from Sudanese embassy, in deep southern Maryland).

core functions of receiving communications related to diplomatic, military, consular, and other matters.

First, the panel's analysis assumes it is permissible and appropriate for Congress to commandeer an embassy's internal and protected processes for communicating with its home country. The panel opinion asserts that "[an] embassy is a logical place to direct a communication intended to reach a foreign country," and appears to regard obligating an ambassador to forward a court document, or to insert a complaint into the diplomatic pouch, as a mere clerical matter. *See* Pet. App. 98a n.3. It is not.

Under the Vienna Convention, on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, an ambassador enjoys full inviolability – in his "person, freedom, and dignity" (art. 29), in his "papers [and] correspondence" (art. 30), from taxation (art. 34), and from legal process (art. 31). His embassy enjoys full inviolability, on which "agents of the receiving state" may not intrude absent his consent. (Art. 22(1), (2).) Its official correspondence – meaning "all correspondence relating to the mission and its functions" – is similarly inviolable. Art. 27(1), (2). Its diplomatic bag cannot be opened or detained. Art. 27(3).

The panel's ruling offends all of these protections. It authorizes the clerk of court, an "agent of the receiving state" (though often acting simply as a forwarding agent for the plaintiff's counsel), to intrude on the embassy's facilities and internal functioning. It mandates the ambassador to play the role of receiving agent for the foreign minister. It presumes to instruct the ambassador to insert the

complaint into the diplomatic pouch, on pain of his country suffering a default judgment if he does not do so.

None of this can be squared with the Vienna Convention's purpose, as stated in its preamble, to "ensure the efficient performance of the functions of diplomatic missions as representing States" or its careful attention to the "freedom [and] dignity" of diplomatic agents and missions. Preamble, art. 29. The panel's constricted reading here is inconsistent with the prior Second Circuit "admonition that the inviolability principle be construed broadly," *Tachiona v. United States*, 386 F.3d 205, 224 (2d Cir. 2004); *767 Third Avenue Associates v. Permanent Mission of Republic of Zaire*, 988 F.2d 295, 298-99 (2d Cir. 1993), as well as *Tachiona*'s recognition that "[i]t is 'essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without hindrance from the government of the receiving state, its officials and even private persons.'" *Tachiona*, 386 F.3d at 223 (quoting Sen, *A Diplomat's Handbook of International Law and Practice* 107 (3d ed. 1988)).

Second, the panel's facile conclusion that the signature on the return receipt "surely constituted 'consent'" (Pet. App. 107a) by the Sudanese ambassador to the service dangerously misapprehends the way contemporary embassies function.[6]

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[6] That conclusion concerning "consent" appears only in the panel's opinion denying the rehearing motion, not in the initial panel ruling. Similarly, the panel's suggestion that embassies

Embassies receive mail and hand-delivered packages by the dozens or hundreds daily. Those materials arrive from a variety of sources: visa applications from its nationals; materials from a state on the arrest of a university student the embassy has sponsored; medical and financial records from U.S. hospitals to which the embassy directs patients in need of specialized treatment; documents to renew a lease on consulate space in Chicago; memos from the embassy's legal counsel; and so on. They are essential to the embassy's operations.

Embassy mailrooms, every bit as much as those of today's Congress or of this Court, screen incoming packages. An envelope addressed "c/o Ambassador" does not simply show up in the ambassador's office. The security personnel inspecting incoming packages are not diplomats; in many embassies they are third-country nationals who are trained for security skills, and may or may not have language capability to distinguish U.S. court complaints from dozens of other incoming items. The fact that one of them signs a return receipt is hardly evidence of "consent" or waiver of the embassy's protections under the Vienna Convention. Under that convention, consent can be provided only by "the head of the mission" – *i.e.* by the ambassador him- or herself. Art. 22(1), art. 1(a).

The panel ruling appears to rest on the view that an embassy can simply adopt a policy of refusing to accept registered mail packages at all. Pet. App. 107a. If the only registered mail packages arriving at a busy embassy were court complaints, that view

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can simply reject incoming mail packages, discussed *infra*, appears only in the ruling on rehearing.

might be defensible. But for the occasional U.S.-litigation needle, there is a haystack of other non-litigation material that would be turned away by such a policy.

Not only is there no support in the statutory language for this result. Interpreting the sovereign immunity law to cause this result mocks the inviolability assured to embassies and ambassadors by the Vienna Convention, and imposes burdens on embassy operations that Congress plainly intended to avoid.

CONCLUSION

The Court should grant certiorari and should reverse the Second Circuit ruling, to remove the conflict in interpretation of the service provisions of FSIA §4(a)(3), to uphold U.S. obligations under the Vienna Convention, to protect U.S. diplomatic posts from reciprocal maltreatment in response to the Second Circuit ruling, and to put plaintiffs to the task of serving the foreign minister as specified by the statute.

Respectfully submitted,

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